Supreme Court, U.S.
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No. 04-529

IN THE

SUPREME COURT OF THE UNITED STATES

SUPERIOR PROTECTION, INC.,

Petitioner,

v.

N.L.R.B.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the discharge of a security guard at a federal office for lying under oath in a National Labor Relations Board the ("Board") representation case hearing is a violation of the National Labor Relations Act because the employee was testifying in behalf of the union seeking representation, even though lying to a public official is grounds for discharge under the General Services Administration (GSA) contract with his employer covering his employment.

2.

Whether in any event the discharged security guard is not entitled to reinstatement or back pay under the after-acquired evidence doctrine because, at the time of his discharge, it was discovered that he was in further violation of the (G.S.A.) contract because his gun was dirty and he was carrying in excess of the maximum ammunition, both offenses being serious infractions of GSA contract rules.

STATEMENT OF INTERESTED PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were:

Superior Protection, Inc. - Petitioner
Michael Jay Kuper - Counsel for Petitioner
Raymond L. Kalmans - Counsel for Petitioner
National Labor Relations Board - Respondent
David Seid - Counsel for Respondent
Aileen Armstrong - Counsel for Respondent
Meredith Jason - Counsel for Respondent
Curtis Wells - N.L.R.B. District 16 - Regional Director
James Carney - USGOA Local 1225 President

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29 U.S.C. § 158(a) (1), (3) and (4).....1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is non-published. The citation of the Decision and Order of the National Labor Relations Board is 339 N.L.R.B. No. 118 (2003).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its opinion on July 26, 2004. This petition is being filed with the Clerk of this Court within 90 days from the date of the judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158(a) (1), (3) and (4) Unfair labor practices

a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not

established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discrimination against an employee because he has filed charges or given testimony under this subchapter;

STATEMENT OF THE CASE

Petitioner Superior Protection, Inc., ("Superior") seeks review of a decision of the United States Court of Appeals for the Fifth Circuit enforcing a decision and order of the Board ordering, among other things, that Superior offer reinstatement and pay back pay to a former employee, Kelvin Trotter, a security guard at a federal office, who was discharged for lying under oath at a Board representation hearing. Lying under oath to a public official is grounds for discharge under the GSA contract covering the guard's employment. When he was discharged, it was discovered that his gun was dirty and that he was carrying in excess of the maximum amount of ammunition allowable, both also grounds for discharge under the GSA contract, and therefore, under the after-acquired evidence doctrine, an additional reason for not enforcing the Board decision and order.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit opinion in this case conflicts with the opinion of this court in *Hoffman Plastic Compounds, Inc.*, 535 U.S. 137 (2002), in which this court reversed a decision of the District of Columbia Circuit Court enforcing a Board decision and order ordering back pay for an illegal immigrant who had obtained his job using fraudulent documents and was discharged for his activities on behalf of a union. This court acknowledged the apparently undisputed illegal employer conduct in violation of the National Labor Relations Act, but refused to enforce the board back pay order, holding

> ...that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield. *Id* at p. 7.

This court in *Hoffman* distinguished *ABF Freight System, Inc.* v. *NLRB,* 510 U.S. 317 (1994), wherein, with obvious great reluctance, a Board order was enforced awarding reinstatement and back pay for an employer who, like the employee in this case, lied under oath in a Board hearing, and the Board, as in this case, found that the real reason for the discharge was union animus, and not the false sworn testimony. In *ABF,*[1] as in *Hoffman,*[2] this court stated with emphasis that the ruling in *ABF* was not to be interpreted as a license for the Board to disregard false testimony under oath, and/or fraudulent conduct. Of course, in this case, as in *Hoffman,* the Board really crossed the line in condoning conduct in violation of the rules of the G.S.A., the federal agency responsible for the security and protection of federal workers.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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[1] "False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a "flagrant affront" to the truth-seeking function of adversary proceedings. *Id* at p. 322.

[2] "This court has consistently set aside the Board's back pay awards to employees found guilty of serious illegal conduct in connection with their employment." *Hoffman,* at p. 137.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 03-60880

NATIONAL LABOR RELATIONS BOARD, Petitioner

verses

SUPERIOR PROTECTION, INC., Respondent

Petition for Enforcement of Order of
The National Labor Relations Board
Nos. 16-CA-21399, 21495 and 10361

Filed July 26, 2004

Before JOLLY, WIENER, and PICKERING, Circuit Judges.

PER CURIAM:*

Petitioner National Labor Relations Board ("NLRB" or "Board") seeks enforcement of its order commanding Respondent Superior Protection, Inc. ("Superior"), its officers, agents, successors and assigns, to cease and desist (1) impliedly threatening employees in writing with discharge or discipline for supporting United Government Security Officers of America and its Local #229 or any other union (collectively, "the Union"), (2) disciplining, discharging or otherwise discriminating against any employee for supporting the Union, (3) disciplining, discharging or otherwise discriminating against employees because they have given testimony under the National Labor Relations Act (the "Act"). The Board also seeks enforcement of its order commanding Superior to reinstate fired employee Kelvin Trotter to his former position, to make him whole for loss of earnings and other benefits pursuant to F.W. Woolworth Co., less any interim earnings and plus interest as computed in New Horizons for the Retarded, to remove from its files any reference to Trotter's discipline and discharge, to make various employment records available to the Regional Director of the NLRB, and to post at its Houston, Texas facility copies of a notice appended to the order. Finally, the Board seeks enforcement of its order instructing the Regional Director of the NLRB to open and count Trotter's contested ballot, serve a revised tally on the parties, and issue the appropriate certificate. Superior resists the enforcement of the orders or any portion or portions thereof.

We have carefully considered the briefs of counsel for the parties and the record of this case as supplemented, including the extensive, highly detailed analysis of the Administrative Law Judge ("ALJ") of August 28, 2002, as modified September 25, 2002. As a result, we conclude, under the applicable "substantial evidence" standard of review, that the NLRB's order is reasonable, supported by such evidence, and must ben enforced in full.

As the parties are fully conversant and familiar with their respective burdens of proof and persuasion and with the standards applicable to our review of cases under § 8(a)(3) and (4) of the Act, we need not reiterate those standards here. If suffices that when the Board charges an employer with unfair labor practices under these subsections–discharging or otherwise discriminating against an employee because he has given testimony under the Act or discriminating by terminating employment to discourage membership in a labor organization–the general counsel's burden of persuasion is to demonstrate what protected activity of an employee, if any, was a substantial motivating factor in an adverse employment action taken by the employer against the employee. If that burden is met, it becomes incumbent on the employer to demonstrate that (1) it took the action complained of on the basis of unprotected conduct, and (2) it would have taken the same action in the absence of protected conduct. An employer's proffered non-discriminatory reason and a determination that the adverse employment action would have been taken even in the absence of protected activity are nevertheless trumped by a demonstration of pretext. The overarching principle is that reasonable decision of the NLRB must be affirmed if it is supported by substantial evidence, even if we might have reached a contrary conclusion. This is particularly true in cases, such as this, when the decision of the NLRB is grounded in large part on credibility determinations of the ALJ who, after all, heard the testimony and observed the demeanor o the witnesses for the opposing parties – here including none other than the employer's President, Jack Heard, and the eventually terminated employee, Kelvin Trotter.

The purportedly non-discriminatory reasons advanced by Superior for the escalating series of adverse employment actions it took against Trotter, culminating with his firing, are (1) lying under oath during the initial hearing conducted by the ALJ and in subsequent federal and state utterances, (2) disobeying a direct command by a superior (here, Heard, the

employer's President) to report for work "on-time" immediately following Trotter's testimony at the initial hearing, (3) insubordination in a confrontation with a supervisor, Jose Castillo, and (4) possessing a "dirty" firearm and a total number of cartridges in excess of the maximum allowed. The ALJ concluded, and the NLRB agreed, based on widely divergent positions and explanations advanced by the parties, that the reasons given by Superior were pretextual, that the disciplinary actions taken against Trotter were grounded in anti-union animus, and that the adverse employment actions in question would not have been taken but for that animus. As we agree, we touch only briefly on Superior's proffered non-discriminatory reasons for its actions.

First, Superior's allegations that Trotter lied address almost entirely statements he made at NLRB hearings and to the State Unemployment authorities regarding his transfer by Superior from Galveston to Houston well before commencement of the organizing efforts here at issue. Other than that, the allegations of mendacity address Trotter's reason for requesting time off on the morning of the initial hearing. He told his immediate supervisor that he needed to attend to a personal matter when, in fact, he was responding to the subpoena for the initial hearing before the ALJ.

Superior's claim that Trotter lied about not having applied for a transfer boils down to a quibble over whether he "applied" on several occasions to be transferred from Galveston to Houston or merely informally "requested," or let his preference be known, that he would like to be transferred to Houston. Not only was the issue whether he had applied for a transfer wholly irrelevant to the purpose of the hearing and Trotter's testimony, Superior's strident efforts to classify Trotter's response as lies under oath fail. As the ALJ and Board observed, the question could easily have been understood by Trotter as going to the matter of a formal, written application for transfer (which he never did)

rather than to informal, oral requests that he be considered for transfer.

As for the reason given by Trotter for requesting a few hours of time off work on the morning of the hearing, there was at least substantial evidence that "personal business" or "personal matters" were explanations frequently given by Trotter and other Superior employees to – and deemed sufficient by – immediate supervisors. Nothing indicates the necessity for an employee, even a court security officer, to go into great detail about the reasons for wanting a few hours off, particularly when, as here, going into greater detail would risk adverse reaction to otherwise protected activity.

Then there is the "charge" that Trotter disobeyed Heard's direct order to report on time, which is particularly revealing of Superior's animus. Even though Trotter's immediate superior, Office Johnson, confirmed that the only thing he had told Trotter about reporting to work after time off on the morning of the initial hearing was that Trotter needed to report sufficiently ahead of his (Johnson's) 4:00 p.m. court date, Superior has endeavored to manufacture a reporting time of noon and then to make much over the time elapsed between Trotter's departure from the initial hearing to change into uniform and report for duty, which he did by approximately 1:30 p.m. What came through loud and clear to the ALJ – then subsequently to the NLRB, and now to us – is that Trotter's surprise appearance and pro-union testimony at the initial hearing touched off an immediate reaction by Heard to squelch Trotter's anti-union activities and (likely) terminate his employment. By telephone, Heard immediately set off a flurry of activity following the adjournment of the hearing and well before Trotter could possibly have made it back to his duty station, even if he had not gone home to change into his uniform. By the time Trotter reported, the Heard-initiated action had traveled directly down the chain of command so that, when Trotter

arrived, Johnson refereed him to Castillo, where the provocation discussed below commenced. We agree with the ALJ and the NLRB that Heard's admonition to Trotter as he left the meeting not to be late for work – even if not the tension-breaking jest that Trotter perceived it to be – cannot be elevated to the level of a direct order of a remote superior to be at his duty station by 12:00 noon.

We also conclude that there is substantial evidence that the confrontation between Trotter and Castillo following Trotter's reporting to work, which encounter admittedly escalated to "heated," was orchestrated from higher up, intentionally provoked by Castillo, and eventually used by Superior as a pretext to mask its anti-union animus in taking the adverse employment actions against Trotter. Castillo twice made Trotter cool his heels for protracted periods while waiting to be seen. The ALJ determined, based in large part on credibility calls, that Castillo deliberately goaded Trotter to the point of heated words and profanity, after intentionally irritating him by making him wait; and that this was deliberate incitement. We cannot say that the credibility calls, factual testimony, and reasonable inferences drawn from substantial evidence do not support this conclusion of the ALJ and the NLRB under the applicable standard of review.

The proffered weapons charge, i.e., that Trotter's sidearm was "dirty" when, on Castillo's order, he turned it over, and that he was in possession of an excess number of rounds for that weapon, is neither consistent with nor violative of the provision of the contract between Superior and the General Services Administration ("GSA") that Superior cites in support of its rule-violation charge against Trotter. Even assuming that the cleanliness of the handgun was not up to the expected level of "spit and polish," such a first-time infraction would fall into the category of the most minor of offenses, at most justifying an admonition to clean it and keep it clean.

Turning to the question of the number of cartridges that Trotter possessed, the applicable provision of the GSA contract or Guard Manual cited by Superior states:

> Each guard, entering on duty, including the uniform onsite shift supervisor(s) shall be issued twelve (12) rounds of 125 grain hollow point ammunition. Six (6) rounds shall be used as a firearm load with six (6) rounds carried in a cartridge case.

This is the sole basis of Superior's claim that Trotter's possession of an excess six cartridges – 18 rather than 12 – put Superior in violation of its contract with the GSA. We agree with the ALJ and the Board that, under no recognized method of contractual interpretation can this language be construed to impose a limit on the maximum number of cartridges that a guard my possess while on duty. To the contrary, the plain wording of the provision is best construed as a minimum ammunition requirement. Regardless of the best interpretation, however, what the insupportable charge against Trotter demonstrates beyond cavil is that Superior was grasping at straws to manufacture charges against Trotter as pretexts for the real basis of his termination – his pro-union activity and Superior's anti-union animus, which stated at the top with Heard and promptly proceeded all the way down the chain of command. This is the conclusion of the NLRB based on the findings of the ALJ; and we cannot say that this conclusion is unreasonable or lacking in support from substantial evidence.

In conclusion, for essentially the same reasons as set forth in the writings of the ALJ and the NLRB, we grant the Board's application for enforcement of the Order filed October 23, 2003, and we order same enforced in full.

ENFORCEMENT ORDERED.

Superior Protection, Inc. *and* United Government Security Officers of America, for and on behalf of Local 229[1]. Cases 16–CA–21399, 16–CA–21495, and 16–RC–10361
July 31, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On August 28, 2002, Administrative Law Judge Robert A. Pulcini issued the attached decision and on September 25, 2002, an erratum to that decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs[2], affirms the judge's

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[1]In a limited exception, the Charging Party moves the Board to amend its name in the caption. We grant the exception and amend the name as requested.

[2]The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties. We also deny the Respondent's motion to reopen the case and receive further evidence. Member Acosta joins his colleagues in denying the Repsondent's exception to the judge's ruling rejecting its attempt to introduce into evidence the entire transcript, correspondence, and pleadings from the preelection hearing in the representation case, rather than just the portion of the transcript containing the

rulings, findings[3], and conclusions[4], and adopts the

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testimony of discriminatee Kelvin Trotter, whose testimony in the present proceeding the Respondent seeks to discredit. In the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. *Transportation Maintenance Services*, 331 NLRB 1050 (2000). Member Acosta finds that the Respondent has failed to explain how the admission of the remaining transcript is appropriate or necessary because, as the judge stated at fn. 2 of his decision, the judge admitted Trotter's previous testimony into evidence, and the remaining key witnesses to matters in issue here—specifically Trotter's alleged status as a discriminatee discharged in violation of Sec. 8(a)(3)—appeared and testified subject to cross examination in the present proceeding.

[3]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[4] In adopting the judge's findings, we find it unnecessary to draw an adverse inference from the Respondent's failure to call employees King and Murphy. Even absent the adverse inference, the judge's findings and conclusions are well-founded in the record. In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and

recommended Order as modified[5].

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(1) when it imposed a 3-day suspension and 90-day probationary period on Trotter, we reject the Respondent's characterization that Trotter was "loud, belligerent, insubordinate, disrespectful, and profane" when Contract Administrator Jose Castillo confronted him. Castillo used this characterization to describe Trotter's actions, but the judge did not credit this testimony. We agree with the judge that the asserted basis for the Respondent's decision to issue the initial 1-day suspension to Trotter was pretextual and that the Respondent could not in the circumstances of this case rely on conduct it provoked as a basis for disciplining Trotter. We adopt the judge's conclusion that the Respondent's stated reason for Trotter's discharge, which was that he "lied" at the Board hearing, was also pretextual. In doing so, however, we do not rely upon the judge's statement that the Board "*construes testimony* before it 'liberally.'" (Emphasis added.) Rather, we note that the Board interprets Sec. 8(a)(4), and not witness testimony, liberally: "[I]t is clear that *Section 8(a)(4) is to be construed liberally* . . . and that it protects even false testimony so long as such testimony was not willingly and knowingly false and uttered with intent to deceive." *Glover Bottled Gas Co.*, 275 NLRB 658, 673 (1985) (emphasis added)

[5]We modify the recommended Order to include a remedial provision for the Respondent's violation of Sec. 8(a)(4). Also, the judge included in his recommended remedy a provision requiring the Respondent to reimburse Kelvin Trotter for any extra Federal or State income tax that would result from the lump sum payment of any backpay award. Granting this request would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985). In light of this, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn. 1 (2000).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Superior Protection, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b) and reletter the subsequent paragraph accordingly.

"(b) Disciplining, discharging, or otherwise discriminating against any employee for supporting United Government Security Officers of America and its Local #229 or any other union.

"(c) Disciplining, discharging, or otherwise discriminating against employees because they have given testimony under the Act."

2. Substitute the following for paragraph 2(b). "(b) Make Kelvin Trotter whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the Regional Director for Region 16 shall, within 14 days from the date of this Order, open and count the ballot of Kelvin Trotter, and shall prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

Because there has been no such briefing in this case, we decline to include this additional relief in the Order here.

No. 04-529

In the Supreme Court of the United States

SUPERIOR PROTECTION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board acted within its discretion in ordering petitioner to reinstate with backpay an employee whom the Board found had been discharged for engaging in activity protected by the National Labor Relations Act.

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In the Supreme Court of the United States

No. 04-529

SUPERIOR PROTECTION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the Federal Reporter, but is *reprinted in* 105 Fed. Appx. 561. The decision and order of the National Labor Relations Board (Pet. App. A8-A11) and the decision of the administrative law judge (App., *infra*, 1a-22a) are reported at 339 N.L.R.B. 954.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2004. The petition for a writ of certiorari was filed on October 18, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a multistate security service providing approximately 700 guards to federal government buildings. App., *infra*, 3a, 7a Petitioner's primary source of business comes from contracts with the General Services Administration (GSA). *Id.* at 3a. GSA defines the parameters for contract performance and awards contracts on a bid basis. *Id.* at 3a-4a.

In 1999, Kelvin Trotter began working for petitioner. App., *infra*, 4a. In 2001, Trotter contacted a representative of the United Government Security Officers of America, Local 29 (the Union), about organizing petitioner's employees in the Houston metropolitan area. *Ibid.* After Trotter gathered signatures on authorization cards from fellow employees, the Union filed with the National Labor Relations Board (Board) a petition seeking to represent a unit of petitioner's security guards. *Id.* at 1a, 4a.

The Board scheduled a hearing to determine the appropriateness of that unit and subpoenaed Trotter to testify. App., *infra*, 5a. Trotter asked his supervisor for time off for "personal business" on the day of the hearing, which was granted. *Ibid.* After Trotter testified at the hearing, he contacted his supervisor to ask when and where to report to work. *Id.* at 6a. His supervisor instructed him where to report to work, but did not specify Trotter's precise starting time. *Ibid.*

During the hearing, petitioner's president Jack Heard learned for the first time of Trotter's union activity. App., *infra*, 4a. After the hearing, but before Trotter had reported to work, Heard called an operations manager in the chain of command above Trotter, and directed him to tell Heard the exact time at which Trotter reported to work. *Id.* at 6a-7a. When Heard

learned that Trotter had not yet reported to work two hours after the hearing had ended, Heard directed Trotter's supervisor to issue Trotter a one-day suspension for being late. *Id.* at 7a.

When Trotter arrived at work, his superior instructed him to report to Captain Jose Castillo. App., *infra*, 7a. After keeping Trotter waiting for a significant period time, Castillo required Trotter to disarm and ordered him to submit to security checks. *Id.* at 7a-8a. Castillo then issued Trotter a one-day suspension. *Id.* at 8a. Castillo asked Trotter to sign a disciplinary form, but Trotter refused. *Ibid.* Trotter asked Castillo about whether he would be paid for the day. *Ibid.* Castillo ignored Trotter's inquiry and ordered him to leave. *Ibid.* When Trotter did not leave quickly enough, Castillo called for an FBI guard to escort Trotter from the building. *Ibid.*

The next day, petitioner issued Trotter a three-day suspension and placed him on 90-day probation. App., *infra*, 9a. One week after the Board's regional director issued the decision setting an election date, petitioner terminated Trotter. *Ibid.*

2. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner's suspension and discharge of Trotter violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1), (3) and (4). Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157. Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage

membership in any labor organization." And Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act.

After a hearing, the administrative law judge (ALJ) sustained the General Counsel's allegations. App., *infra*, 1a-22a. The ALJ found that the President's extraordinary level of concern about whether Trotter reported to work on time following the hearing and Castillo's unprecedented orders to Trotter to disarm and pass through a metal detector were compelling evidence that the discipline was unlawfully motivated. *Id.* at 11a-13a.

The ALJ rejected as pretextual petitioner's purported reasons for disciplining and discharging Trotter, including petitioner's claim that Trotter lied at the representation hearing about whether he had formally applied for transfer to petitioner's Houston location. App., *infra*, 16a. The ALJ explained that Trotter was a credible witness and that petitioner had failed to show that the statements at issue were false, or that they related to a substantial issue. *Id.* at 16a-17a & nn. 29, 30. The ALJ found it particularly significant that the transfer issue was "barely material in the scheme of [the] representation case issues," and that petitioner made no effort to explain why Trotter's statement warranted his discharge. *Id.* at 16a. In those circumstances, the ALJ found petitioner's claim to be "pure subterfuge, masking the true motive of retaliation." *Id.* at 17a.

The ALJ also rejected petitioner's claim that it would have discharged Trotter in any event because he had excess ammunition and a dirty firearm, allegedly in violation of the GSA Contract Guard Information Man-

ual (GSA Manual). App., *infra*, 9a n.13. The ALJ found that the GSA Manual did not specify the maximum number of bullets that a guard can carry, and that the alleged violations did not rise to the level of a dischargeable offense. *Ibid.*

The Board affirmed the ALJ's findings and conclusions. Pet. App. A8-A11. The Board specifically adopted the ALJ's finding that petitioner's stated reason for discharging Trotter was pretextual. *Id.* at A10 n.4. The Board ordered petitioner to offer Trotter reinstatement to his former job and make him whole for any loss of earnings and benefits suffered as a result of petitioner's unlawful activity. *Id.* at A11.

3. The court of appeals enforced the Board's order. Pet. App. A1-A7. The court concluded that substantial evidence supported the Board's finding that petitioner unlawfully suspended and discharged Trotter, and it enforced the Board's remedial order. *Id.* at A2. The court characterized petitioner's claim that Trotter lied at the hearing as "a quibble over whether he 'applied' on several occasions to be transferred * * * or merely informally 'requested' or let his preference be known, that he would like to be transferred." *Id.* at A4. The court concluded that "[n]ot only was the issue whether he had applied for a transfer wholly irrelevant to the purpose of the hearing and Trotter's testimony, [petitioner's] strident efforts to classify Trotter's [testimony] as lies under oath fail." *Ibid.* The court explained that "the question could easily have been understood by Trotter as going to the matter of a formal, written application of transfer (which he never did) rather than to informal, oral requests that he be considered for transfer." *Id.* at A4-A5.

The court of appeals also rejected petitioner's challenge to the Board's order based on Trotter's alleged

firearm infractions. Pet. App. A6-A7. The court held that the contract with GSA did not "impose a limit on the maximum number of cartridges that a guard may possess while on duty." *Id.* at A7. Rather, "the plain wording of the provision is best construed as a minimum ammunition requirement." *Ibid.* The court further determined that, even assuming Trotter's firearm was not "up to the expected level of 'spit and polish,' such a first-time infraction would fall into the category of the most minor of offenses, at most justifying an admonition." *Id.* at A6. The court concluded that petitioner "was grasping at straws to manufacture charges against Trotter as pretexts for the real basis of his termination—his pro-union activity and [petitioner's] anti-union animus." *Id.* at A7.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 3) that the award of backpay in this case conflicts with *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002). That contention is without merit.

In *Hoffman*, the Court held that federal immigration policy precluded an award of backpay to an undocumented alien who had been unlawfully discharged, but who initially had obtained his job with fraudulent documents, in violation of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. The Court explained that "when the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." 535 U.S. at 147.

Petitioner argues that the principle involved in *Hoffman* is applicable here because the Board's backpay award rewards Trotter for lying under oath at a representation hearing in conflict with GSA policy. That argument ignores the ALJ's finding, affirmed by the Board and the court of appeals, that Trotter did not lie under oath at the representation hearing when he testified that he never made a formal application for a transfer. Pet. App. A4; App., *infra*, 6a n.7. Moreover, as the court of appeals explained, the question whether Trotter formally applied for a transfer was not relevant to any issue at the hearing, and petitioner simply seized on Trotter's response as a pretext to retaliate against him for testifying in support of the Union. Pet. App. A4-A5. Thus, unlike the situation in *Hoffman*, the Board's backpay order does not trench on any other federal statute outside the Board's competence to administer. Instead, it remedies a clear violation of the National Labor Relations Act.

Petitioner's assertion (Pet. 4) that the Board's order condones violations of GSA firearms rules in violation of *Hoffman* also ignores the findings below. As the court of appeals explained, the number of bullets Trotter possessed did not violate any GSA rule. Pet. App. A7. And while his handgun may not have met expected levels of cleanliness, petitioner failed to show that such a first-time minor infraction would have warranted a termination under GSA policy. *Id.* at A6.

2. Finally, relying on Trotter's alleged violation of GSA firearms rules, petitioner contends (Pet. 3) that the "after-acquired evidence doctrine" provides "an additional reason for not enforcing the Board's decision and order." That doctrine, however, applies only when the after-acquired evidence would have caused the employer to discharge the employee independently of any

improper considerations. *Marshall Durbin Poultry Co.*, 310 N.L.R.B. 68, 70 (1993), enforced in relevant part, 39 F.3d 1312 (5th Cir. 1994); cf. *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) (applying similar backpay limitation rule under ADEA). See *Frazier Indus.* v. *NLRB*, 213 F.3d 750, 759 (D.C. Cir. 2000) (burden on employer to show that it would have discharged the employee for the misconduct, not simply that it could have done so, citing *Marshall Durbin*, 310 N.L.R.B. at 70)). For the reasons discussed above, petitioner's after-acquired evidence would not have caused it to discharge Trotter. The GSA does not have a maximum cartridge rule, and petitioner failed to show that Trotter's minor cleanliness infraction justified more than a warning.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2004

APPENDIX

NATIONAL LABOR RELATIONS BOARD

CASES 16-CA-21399,
16-CA-21495, AND 16-RC-10361

SUPERIOR PROTECTION, INC. *AND* UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, FOR AND ON BEHALF OF LOCAL 229

July 31, 2003

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* * * * *

ATTACHMENT

DECISION

STATEMENT OF THE CASE

ROBERT A. PULCINI, Administrative Law Judge. This case was tried in Houston, Texas, on March 11 and 12, 2002. The charge was filed on September 10, 2001,[1] against Superior Protection, Inc. (the Respondent) by the United Government Security Officers of America, Local 29, AFL-CIO (the Union). A complaint issued on November 16, 2001. The Union filed a petition seeking an election in a unit of the Respondent's employees on August 20. The election, conducted between October 15 and 29, resulted in one determinative challenged ballot. The issues relating to this election and the outstanding complaint were consolidated for hearing on November 29. The complaint was amended, as well, on November 29. The amended complaints allege that the

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[1] All dates are in 2001 unless otherwise indicated.

Respondent discriminatorily disciplined and then discharged employee Kelvin Trotter (Trotter), thereby violating Section 8(a)(1), (3), and (4) of the National Labor Relations Act (The Act). The determinative ballot arising out of the election is the ballot of Trotter.

Issues

(1) Whether the Respondent discriminated against Trotter by disciplining him and then firing him because of his activities on behalf of the Union.

(2) Whether the Respondent discriminated against Trotter by disciplining and then firing him because he participated in proceedings before the National Labor Relations Board.

(3) Whether the Respondent's challenge to the ballot of Trotter is appropriate.[2]

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[2] The Respondent attempted to litigate representation case issues during the hearing. The General Counsel objected to this. I ruled in favor of the General Counsel and forbade the introduction of this evidence. The Respondent offered documentary evidence on these issues, which I rejected. These exhibits were placed in a rejected exhibits file. However, I rejected further attempted proffers without allowing the placing of related written material into the rejected exhibits file. In its brief, the Respondent renewed its request to place this material into the rejected exhibits file. The General Counsel moves to strike the portions of the brief relating to these exhibits and opposes this. I agree with the General Counsel that the underlying subject matter of these exhibits is beyond this proceeding. The Respondent seeks to relitigate issues belonging to the representation case, while offering no convincing grounds to do so. The thrust of its argument centers on its dealing with the General Counsel and Region 7, which it found unsatisfactory. However, the Respondent simply did not establish the materiality and relevancy of these "issues" to the status of Trotter as an alleged discriminatee. Thus, my barring inquiry into these issues at hearing is appropriate in the interests of maintaining a

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates from its facility in Houston, Texas, where it annually provides security services to federal agencies. The Respondent annually provides these services valued more than $50,000 to customers located outside of the State of Texas. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent operates a multistate security service providing guards for Federal buildings. Its primary source of contractual business is the General Ser-

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taut, precise record. However, I will allow the Respondent to augment its rejected exhibits by having the attachments to its brief referred to as X-1 through X-12 included. In so doing, I seek only to preserve the due-process rights of the Respondent. The substance of this rejected evidence, I continue to view, as completely irrelevant to the issues. Similarly, I deny the General Counsel's motion to strike portions of the Respondent's brief dealing with these matters. The subject is excluded evidence, and I will not consider any of it.

[3] The General Counsel's unopposed motion to correct the record, dated April 17, 2002, is granted and received in evidence as GC Exh. 13. The Respondent's unopposed motion to correct the transcript dated April 17, 2002, is similarly granted and received into evidence as R. Exh. 16.

vices Administration (GSA). GSA defines the parameters for contract performance and awards contracts on a bid basis. The principal officer of the Respondent is its president, Jack Heard. Heard presides over his hundreds of guards with various supervisory help. Unions represent employees in some locations. The situs of the issues in this case is Houston, Texas.

Trotter worked for the Respondent's predecessor company, Southwest Security, for sometime. The Respondent hired Trotter when it assumed the contract of this company in November 1999. Trotter's work history with the Respondent, before the events involved here, is essentially unremarkable. He received two minor instances of discipline before September 2001 and at least one letter of praise from a Federal agency he guarded. It is undisputed that the Respondent viewed Trotter as a satisfactory employee before September 2001 when the alleged discriminatory events happened.

Sometime in April or May, Trotter contacted the Union through its representative, James Carney, about unionizing the Respondent. Trotter used a pseudonym, Jonathan Wills, in this contact. He testified he was concerned about losing his job, a concern that ultimately proved to be prescient. In the ensuing months before August 20,[4] Trotter got cards from Carney, passing them out and retrieving them surreptitiously. He appears to have done this quite successfully. The evidence is clear that the Respondent did not become aware of Trotter's involvement until the very day of the representation hearing at the NLRB offices.

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[4] The Union filed the petition for an election on this date.

The NLRB scheduled a representation hearing for September 4. Trotter received a subpoena to appear. He failed to tell the Respondent about this subpoena.[5] Instead, Trotter asked his superior, Lieutenant Albert Johnson, for time off on the date of the hearing for "personal business."[6] Johnson did not ask Trotter what this business was. He told Trotter he would speak to Captain Jose Castillo about it. Trotter had taken time off on five or six previous occasions in exactly this way. Johnson did speak to Castillo and reported to Trotter the next day that he could have his time. Johnson told Trotter that he might have to cover a shift at the Military Enlistment Processing Station (MEPS) if someone from there took his shift. In fact, no one told Trotter anything about work schedules for the day of the hearing, until the day of the hearing.

Trotter attended, as did Union Attorney Nelson, Heard, and Michael Jay Kuper, the Respondent's attorney. Trotter asked early on how long the hearing would take and told those present that he had to leave at 12 or 12:30 p.m. so he could change into his uniform for possible work that afternoon at MEPS. No one told Trotter anything to the contrary to that point. Trotter then testified for the Union at length. Kuper cross-examined him and asked Trotter where he had first

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[5] Trotter never disclosed his subpoena to Respondent. Thus, it is a red herring. His failure to disclose it removed him from its inherent protections.

[6] There was some dispute about Johnson's supervisory status at hearing. It is not an issue affecting this case. The Respondent sought to relitigate Johnson's status as a statutory supervisor. Johnson had undisputed authority to arrange employee work schedules as he did in Trotter's case. This is the only relevant fact. Whether he is a statutory supervisor is immaterial to the issues in this case.

worked and how he had come to be in this present position in Houston. Trotter testified he had first worked in Galveston for the Respondent for a time and then asked for transfer to Houston.[7]

As Trotter left the hearing, Heard said to him, "Don't be late." Trotter called Lieutenant Johnson and asked about work for that day. Johnson told Trotter to relieve him at the Social Security building because he himself had some court date for 4 p.m. that day. Trotter told Johnson that he would report about 12:30 p.m. after he changed into his uniform. Johnson testified that Trotter's starting time was left open. Trotter did not give him a precise starting time.[8]

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[7] The exchange between Kuper and Trotter was:

Q. Do you spend part of your time in Houston and part of your time in Glaveston?

A. No sir. I work in Houston now.

Q. And what was the reason for the change?

A. A position came available and they gave it to me.

Q. Did you apply for it?

A. No sir. There's no formal applies.

Q. I'm sorry.

A. No sir.

Q. I see. But you didn't apply to Houston, they told you that you had to come to Houston, is that your testimony?

A. It's not a have to, they offered me a position to come to Houston and I took it.

[See GC Exh.8., Q referring to question and A to its answer.]

[8] I found Johnson to be a reasonably credible witness. He answered all questions without hesitation although he seemed somewhat confused about the reasons for Trotter's discharge.

While Trotter was arranging his reporting time, Heard called his operations manager, Mike Lane. He told Lane to report to him exactly what time Trotter arrived at work. Lane is the Respondent's executive functionary and manages the approximately 700 guards of the Respondent's multistate operation. This personal interest in one employee was unusual for Heard. Heard's inquiry flowed down the supervisory hierarchy from Lane to Captain Jose Castillo to Lieutenant Johnson. Johnson told Castillo that Trotter had still not reported in. This information made its way back to Heard. Heard told Castillo to issue Trotter a 1-day suspension when he came to work.[9] Trotter came to work at the Social Security building between 1:30 and 1:45 p.m. When he arrived, Johnson told him to go to the FBI building to see Castillo. Trotter arrived at the FBI building and approached the security desk where fellow officer Murphy was on duty. He told Murphy he was there to see Castillo. Murphy went to Castillo's nearby office and told Castillo that Trotter was there.

Castillo kept Trotter waiting for about 30 minutes before coming into the area where he waited. Castillo, without explanation, ordered Trotter to disarm himself. Trotter compiled without questioning the order. He took his gun to his car and stowed it. In his previous 10 to 15 visits to the FBI building, Trotter was never asked to remove or surrender his weapon. Trotter came back into the building but Castillo had returned to his office. Another 15 minutes elapsed. Trotter asked another officer named King if he could knock on

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[9] It is unclear how long this chain-of-command dialogue took. However, the inference from the facts is that it took place sometime between the close of the Board hearing at about noon time and 1:30 p.m.

Castillo's door. King told him to go ahead and Trotter knocked.[10] Castillo told Trotter to continue waiting. Ten minutes later, Castillo emerged from his office and ordered Trotter to go through the metal detector.[11] Trotter balked at the order and asked to be wanded instead. Castillo refused this request and ordered Trotter to go outside the building. Both men went outside. Castillo then read from a paper that Trotter testified was the Respondent's disciplinary form. Castillo read that Trotter had failed to give his supervisor proper notification that he was taking off from work and reported late. Castillo asked Trotter to sign this form but Trotter refused. Trotter told Castillo that he had received permission to take off that day from Johnson to no avail. The exchange between Castillo and Trotter was heated.

As Castillo went back into the building, Trotter followed him, asking about pay for the day. He also asked if he could get a copy of the disciplinary form. Castillo refused to give Trotter a copy because, he said, Trotter refused to sign it when he read it to him. Castillo ignored Trotter's inquiry about pay. Instead, he ordered Trotter to leave. Trotter did not respond quickly enough for Castillo, who ordered officer King to call the FBI duty officer. The FBI officer came and ordered Tortter to leave on Castillo's assertion that Trotter was causing a scene.

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[10] It is unclear whether the office door was closed. Castillo testified that he shared the office with another person unconnected to the Respondent. The office was physically on the public side of the secured area.

[11] Proceeding through the metal detector was an unusual act for a uniformed officer on duty to engage in.

The evening, Trotter received a call at home from Castillo, telling him to report to the main office the next morning. Lane and Castillo awaited him the next day.

Upon his arrival, Lane said he was giving him a 3-day suspension and placing him on 90 days' probation for the events at the FBI building.[12] Trotter unsuccessfully tried to defend himself.

The Respondent fired Trotter on September 21, a week after the Decision and Direction of Election issued. Lane sent Castillo to Trotter's duty station at about 4 p.m. that day. Castillo asked Trotter for his weapon and ammo. As he collected these, he reproved Trotter for having a dirty weapon and having too many bullets.[13] Trotter asked him about the reason for his discharge. Castillo told him to call Lane and find out the reasons. On September 24, Trotter called Lane. Lane told him that the Respondent fired him for lying at the Board hearing. The Respondent fired only two other employees in the 3 previous years.

The Respondent issued a letter to employees on October 11, just before the election.[14] In its relevant portion, this letter reads:

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[12] Lane told Trotter he had engaged in "boisterous and disruptive activity in the workplace." Trotter, he said, had engaged in "insubordination and disrespectful conduct."

[13] The question of having six extra bullets, the Respondent alleged, violates GSA contract guard manual regulations. A review of this document did not reveal this requirement. In any case, such an infraction hardly rises to the level of a dischargeable offense, especially given the entire context of the events in this case.

[14] The election in the representation case was held on October 30, resulting in a tie vote. The single challenged ballot of Trotter is determinative of the results.

> Recently, a security officer working on a Houston contract was terminated by the company. The officer and the union falsely claim that this employee was terminated due to this involvement with the union. In actuality, the employees was terminated because he lied under oath in a Labor Board hearing trying to help the union, which is against the law. This particular officer was a good employee; and unfortunately he was apparently influenced by disreputable individuals resulting in his termination.

The Respondent acknowledged through its president, Heard, that the "disreputable individual" referred to in this letter is Union Representative Carney.

III. DISCUSSION AND ANALYSIS

The Respondent raises a plethora of defenses of the issues in this matter. Many of these go to the merits of the representation case and ruling made by the Regional Director. None of this, however, is before me or germane to the questions raised by the Respondent's conduct toward Trotter. Possible repercussions to the representation case arise only in the context of the Trotter's challenged ballot and its resolution.

The decisional principles in *Wright Lane*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), and its many progeny set out the schematic for analysis of cases of alleged discrimination. First, the General Counsel must first make out a showing supportive of an inference that protected activity is the motivating factor in the discharge or discipline involved. Once this happens, the burden shifts to the employer to show that what occurred to the employee would have happened, in any event, irrespective of the employee's protected concerted activity. A prima facie case exists if the

General Counsel establishes union activity, employer knowledge of that activity, animus and adverse action against the person or persons involved that has the effect of discouraging union activity. See *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

If an employer's stated motives for its actions are found to be false, an inference may be found in the circumstances or facts of the case that the true motive is one the employer wishes to conceal. Such an inference exists in viewing this record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Moreover, the Respondent never sufficiently rebuts the case of General Counsel with a preponderance of evidence leaving the negative inference drawn extent; see *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

A. *The 1-Day Suspension*

Of the witnesses testifying for the Respondent, Jack Heard's testimony is pivotal.[15] Heard turned his eye towards Trotter, literally within moments of his testi-

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[15] I scrupulously observed Heard's testimony and weighed his account of events against the other witnesses. His demeanor, in trial, had an exaggerated authoritarian quality to it. He visibly bridled with the questioning of his motives or decisions by others. The evidence reflects that Heard has deep roots in law enforcement, rising to positions of great authority and power before starting his successful business. The Respondent conducts its business in a manner largely reflective of his personality. Thus, it, too, is very authoritarian in how it operates. It is clear from Heard's demeanor and testimony that he found Trotter's hearing appearance, on behalf of a union whose agents he called "disreputable," an act of consummate betrayal. His testimony of his reasons for acting against Trotter seemed pure invention. He conveyed an impression of expressing a contrived rationale to mask other motivation.

mony, warning him not to be late.[16] As Trotter left, Heard began the process of inquiry from his subordinates about him. This culminated in his ordering Trotter's discipline before he even arrived at his duty station. Lane testified that Heard's involvement in Trotter's case was merely an expression of a concerned chief executive officer with the details of business. I reject this explanation as patently incredible.[17] Trotter was 1 of nearly 700 guards. In any normal business context, Trotter's being late for work would never have risen to the level of Heard's interest and involvement.[18] Trotter's testimony changed that context.

The General Counsel successfully makes out a prima facie case in regards to the first instance of Trotter's discipline that the Respondent fails to rebut. Trotter

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[16] Heard's warning to Trotter comes without a prelude. Heard did not ask a single question about Trotter's schedule or what arrangements he had made to be present at the hearing.

[17] Lane's demeanor, while testifying, was the loyal subordinate tailoring his responses to serve the needs of his superior. I place little reliance on anything he said.

[18] The Respondent states that Captain Castillo monitored Trotter's immediate posthearing behavior because Lieutenant Johnson was supposed to be absent himself that afternoon. None of the complicated scenario the Respondent presents of supervisory concern rings true. The Respondent, in its brief, argues that Heard's authority was in issue since he told Trotter not to be late, thus precipitating the flurry of phone calls back and forth to check on Trotter's progress to work. I find that an absurd premise. Trotter had worked out his time for report with his immediate superior. He called Johnson after the hearing, telling him when he intended to report. He did so within the parameters of that call. The Respondent brewed a tempest in a teapot over Trotter's reporting late to work. The only reason that explains the unusual behavior by Heard is the desire to punish Trotter at once for his activity at the hearing that day.

testified for the Union in a Board hearing before the Respondent's chief executive officer (CEO). The Respondent disciplined him at the orders of that same CEO within hours of his testimony. This was unusual in the context of the previously meted-out discipline. The Respondent does not adequately answer the General Counsel's case.[19] Thus, I infer that this first instance of discipline was discriminatorily motivated. See *Adco Electric, Inc.*, 307 NLRB 1113 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991). In drawing this inference, the timing of the event and the way the Respondent chose to enforce the alleged misconduct were compelling factors.

B. *The 3-Day Suspension and 90-Day Probationary Period*

The circumstances of this event brings into conflict Castillo's version of event and Trotter's.[20] In the undisputed details of this encounter, there are troubling facts tilting the resolution of the issue in favor of the General

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[19] There was no evidence introduced to demonstrate the punishment given Trotter was consistent with the Respondent's past practice. There was no evidence to show that CEO Heard ever directly involved himself with the initial discipline of any employee, least of all for the comparatively trivial incident of being late for an open-ended tour of duty.

[20] Castillo, like Lane, seemed the loyal subordinate seeking his superior's approval. He delivered his testimony with rote exactitude; giving answers to questions in a way he felt beneficial to Respondent. I place little reliance in them. Trotter, on the other had, nervously stumbled to explain events. He appeared puzzled as to what had happened to him, almost hurt at the treatment afforded him by Respondent. His account was ingenuous in its presentation and thus very credible. Against the conflicting versions of events, I credit Trotter over Castillo.

Counsel's case. First Johnson sent Trotter, at once to see Castillo. The Respondent never explained the imperative that demanded this special calling out for punishment or the necessity to implement it immediately. When Trotter arrived at the FBI building, he underwent a series of seemingly arbitrary orders, first to disarm and then to pass through the metal detector.[21] Neither of these things had ever been necessary before. Moreover, Trotter was kept waiting for a long time by Castillo. Castillo never explained why he deemed it necessary to do so. Secondly, I do not accept his explanation of these events. Rather, I find that this circumstance of this delivery of discipline was intentionally designed to victimize Trotter.[22] Disarming Trotter and then requiring him, as a uniformed officer, to pass through the metal detector in front of his fellow officers was intended to publicly humiliate him and mark him.[23]

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[21] Castillo had a number of options available to him that did not require Trotter disarm himself or submit to being effectively searched by the mental detector. One of these was to see Trotter inside his office outside of the security area. He chose not to do this. Eventually, at Trotter's protest about the metal detector, he elected the option of seeing him outside the building.

[22] The General Counsel requests that I draw an adverse inference from the Respondent's failure to call the two witnesses to this event, officers King and Murphy. I grant the request. Both officers were in a position to observe all that transpired between Castillo and Trotter. I infer the Respondent did not call them because their testimony would have been adverse to the Respondent's case.

[23] I have taken into account the special relationship of trust and responsibility that is inherent in the wearing of a uniform and the carrying of a weapon. These are the societal symbols of power and authority. Stripping these away, in my view, carried a public message of the Respondent's withdrawal of the trust from Trotter, the union organizer.

Trotter doubtlessly acted up when Castillo began to read his discipline to him.[24] However, by that time, Castillo humiliated and provoked Trotter in his treatment of him. His behavior, described by the Respondent as "boisterous" and "disruptive," were the result of the Respondent's actions.[25] I agree with the General Counsel. A respondent may not take advantage of a situation it creates to discriminate further against an employee. *Teksid Aluminum Foundry*, 311 NLRB 711 (1993).

C. *Trotter's Discharge*

The Respondent says it fired Trotter on September 21 for the events of September 4, i.e., being late for work, acting out when disciplined, and, most importantly, for lying at the Board hearing. The text of the Respondents case is that Heard, concerned about the content of Trotter's Board testimony, ordered an "investigation."[26] GSA work rules, the Respondent states, allows for disciplinary action towards an employee for "lying to a government official or your supervisor." In its brief, the Respondent catalogues 19 separate incidents where it says Trotter "lied" but centers its discharge case on Trotter's answers to the Respondent's

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[24] The conflicting versions of this event do have some common ground. Trotter's voluble reaction to discipline is one of them.

[25] This description conveniently fits the descriptions of misbehavior set out in the employee handbook.

[26] The Respondent's brief states, "At that point Heard ordered the investigation of the veracity of Trotter's testimony at the representation case hearing, and Trotter's employment future at Superior was doomed; it was the straw that broke the camel's back."

question about how he came to work in Houston.[27] The Respondent also accuses Trotter of lying in the instant case.[28] In presenting its defense on this, the Respondent did not cite any authority that privileged its conduct.

The Respondent's draconian approach towards Trotter's alleged "lies" carries with it serious burdens of proof to be credible.[29] These burdens are never met. Whether Trotter formally applied for transfer or simply asked for one is an insubstantial issue. The manner Trotter came to his Houston job is barely material in the scheme of representation cases issues. Yet, the Respondent never explained why this question was so transcendently important that alleged "lying" about it

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[27] The interpretation of whether Trotter's oral requests for transfer from Galveston to Houston duty station was a "formal" act or not is the root of this "lying" issue. The Respondent construes Trotter's failure to acknowledge his transfer request as a "formal" act a "lie."

[28] The Respondent's brief alleges in part, "He [Trotter] lied under oath at the hearing in this case, stating that Heard told him in a joking manner not to be late for work." He lied under oath at the hearing in this case, stating that the hearing in the representation case was not over until after 12:00 p.m. when in fact it was over, according to the official transcript, at 11:11 a.m." He lied under oath at the hearing in this case, stating that he was late for work because he had to go home and change clothes. First, he left the hearing at 11:11 a.m. and did not report to work until 1:45 p.m., and he lives in Houston. Second, he could have changed his clothes at any number of places at or near the building where the representation hearing was held or somewhere in between."

[29] The General Counsel points out that the burden here is proving testimony false, uttered with intent to deceive, and relating to a substantial issue. The Respondent fails in every aspect of this burden, especially showing why any of these alleged lies is intrinsically important.

warranted discharge. It only argues that Heard believed the statement intentionally false, compelling him to act upon it.[30] I find this premise pure subterfuge, masking the true motive of retaliation for Trotter's testimony at the Board proceeding and his manifest support for a union whose officials the Respondent found "disreputable."[31] *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *In-Terminal Service Corp.*, 309 NLRB 23 (1992). The Respondent thus violated Section 8(a)(1), (3), and (4) in disciplining and then firing Trotter for "lying" to the Board.[32] *Big Three Industrial Gas & Equipment Co.*, 212 NLRB 800 (1974).

D. *The October 11 Letter to Employees*

The Respondent states the October 11 letter to employees is in full accord with Section 8(c) of the Act to express its views freely, provided there is no "threat of reprisal or force or promise of benefit." However, it alternatively argues that finding this letter threatening

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[30] I previously found Trotter to be a credible witness. My review of the record as a whole discloses no instance where Trotter dissembled on any substantive material issue.

[31] In reaching this conclusion, I am satisfied tat the history of other employee discipline sheds little light on whether Trotter was treated consistent with past practice. The Respondent simply never met the burdens shifted to it by the General Counsel under *Wright Line*, *supra*.

[32] The Board, as the General Counsel points out, construes testimony before it "liberally." This means even arguably false testimony is protected as long as it is not willingly and knowingly false or uttered with an intent to deceive, citing *Glover Bottled Gas Co.*, 275 NLRB 658 (1985). I concur. Objectively, Trotter, like all witnesses, is entitled to a broadly reasonable standard in a review of his testimony. Only egregious incidents qualify as perjury and, then, only after a considered due process injury by an appropriate body charged with policing such matters.

is a de minimus event, unworthy of a remedial order. The General Counsel contends, to the contrary, that this case follows squarely within the ambit of *Big Three Industrial Gase & Equipment Co., supra.*[33] I am in full agreement with the General Counsel. Heard's letter to employees, on the eve of the election, is a blatant warning that he (the Respondent) fires employees who engage in union activity. Heard described Trotter as a good employee "apparently influenced by disreputable individuals resulting in his termination." There is no subtlety in this message. The letter does precisely what Section 8(c) warns of, threatening reprisal and force against employees engaging in protected concerted activity flagrantly striking at the heart of what the purpose of the Act is about. Thus, I find the Respondent violated Section 8(a)(1) of the Act by implicitly threatening employees who engage in union activity or who participate in the Board's proceedings.

E. *Trotter's Challenged Ballot*

The Respondent challenged Trotter's ballot at the election as a discharged employee. Since I find Trotter was discriminatorily discharged, he is an eligible voter. Accordingly, I recommend that Trotter's ballot be opened, counted, and a revised tally of ballots issue. If the election result establishes union majority, a Certification of Representative will issue as appropriate.

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[33] "The announcement of the discharge with the reason therefore was a deliberate and contrived attempt to instill fear in the minds of all its employees that any employee assistance to the Union could and would result in dire consequences to the employees including discharge, if they engaged in similar conduct."

CONCLUSIONS OF LAW

1. By disciplining and then discharging Kelvin Trotter (the Respondent) has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1),(3), and (4) and Section 2(6) and (7) of the Act.

2. By impliedly threatening employees with discharge, the Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also reimburse the employee for any additional Federal and/or State income taxes that may result from the lump sum payment of the monetary award.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[34]

ORDER

The Respondent, Superior Protection, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly threatening employees in writing with discharge or discipline for supporting a union.

(b) Discharging or otherwise discriminating against any employee for supporting United Government Security Officers of America and its Local 229 or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kelvin Trotter full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Kelvin Trotter whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in

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[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the remedy section of the decision to include reimbursing him for any additional Federal or State income taxes arising out of any lump sum payment to him.

(c) Within 14 days from the date of this Order, remove from its files any reference to Kelvin Trotter's unlawful discipline and discharge, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the term of this Order.

(e) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

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[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.